

Changes for Adoption Statute

This is a rearranged version of 854.20, to reflect a planned reorganization to correct for some drafting glitches. *Committee Notes are in italics.*

The version here goes significantly beyond the changes indicated in the most recent LRB draft, but retains the revised numbering scheme of that draft.

854.20 Status of adopted persons.

(1) INHERITANCE RIGHTS BETWEEN ADOPTED PERSON AND ADOPTIVE RELATIVES.

(a) Subject to para (b) and (5), a legally adopted person is treated as a birth child of the person's adoptive parents (and the adoptive parents are treated as the birth parents of the adoptive child) for purposes of transfers at death by, through and from the adopted person and for purposes of any statute or other rule conferring rights upon children, issue or relatives in connection with the law of intestate succession or governing instruments.

Committee Note: This provision establishes the general principle that adopted people are members of the adoptive family, and have the same status as a child who is in that family by birth.¹

¹ Except as noted below, this subsection is identical to former 854.20(1), except that the phrase "for purposes of any statute conferring rights..." has been changed to "for purposes of any statute or other rule conferring rights..." In addition, a cross reference to the contrary intent subsection, sub (5), has been added. Because of rearrangement of the provisions, the cross reference to sub (4) in the former statute has been changed to cross reference sub (b).

The clause "and the adoptive parents are treated as the birth parents of the adoptive child" has been added to clarify that the change in relationship goes in both directions; the adopted child is treated as the birth child of the adopted parents, and vice versa.

The prior statute provided that it applied for purposes of intestate succession by, through and from the adopted person, while the revised statute applies for purposes of transfers at death. Given the language that follows this clause, the Committee considers the change to be a clarification and not a substantive change.

(b) Subject to (5), sub (a) applies only if at least one of the following applies:

- 1. The decedent or transferor is the adoptive parent or adopted child.**
- 2. The adopted person was a minor at the time of adoption.**
- 3. The adopted person was raised by the adoptive parent in a parent-like relationship beginning on or before the child's 15th birthday and lasting for a substantial period or until adulthood.**

Committee Note: This provision puts a limit on the general principle stated in sub (a), in an attempt to exclude adoptions that are motivated by a desire to gain a benefit under someone else's estate plan – sometimes called “strategic adoption” – rather than because of a true parent-child relationship. Thus, one of three criteria must be met in order to qualify as a member of the adoptive family:²

If the decedent or transferor is the adoptive parent or adopted child, then there is no “strategic adoption” problem because the estate plan is that of the adoptee or the parent, not a third party; under (b)1., the child is treated as a member of the adoptive family. Thus, for example, a transfer to the issue of a decedent under intestacy will include adopted children no matter when they were adopted, but will include adopted grandchildren only if one of the other criteria of subsection (b) is met. (Because the transfer was not under a governing instrument the contrary intent provision under sub (5) does not apply.)

To guard against strategic adoption, (b)2. and 3. require that, in order to be treated as a member of the adoptive family, the child must have been either adopted while a minor, or, if adopted after minority, been raised by the adoptive parent in a parent-like relationship beginning on or before the child's 15th birthday and lasting for a substantial period or until adulthood. The assumption is that if the child doesn't meet one of these criteria, then there probably isn't a true parent-child relationship, unless the transfer is under a governing instrument and the contrary intent provision is satisfied.

Note that the contrary intent exception for transfers under governing instruments applies not just to the general provision under (a), but also to the exceptions under sub (b). Consider these examples:

- 1. Decedent provides for a transfer to her grandchildren, one of whom was adopted at age three. The criteria of subsection 1 are met, but if there is sufficient extrinsic evidence that*

² The content of subsection (b) is similar to former s. 854.20(4); however former sub (4) modified the entire statute, whereas under the revised statute, the limitation only applies to certain subparts of the statute. Also, former s. 854.20(4)(b)(3) required that the adopted person be raised as a member of the household by the adoptive parent from the child's 15th birthday or before. The revised statute changes this requirement to focus on the existence of a parent child relationship, without regard to where it occurred.

Decedent did not wish to consider the adopted person to be her grandchild for purposes of the transfer, then subsection 1 will not apply.

2. Decedent provides for a transfer to her grandchildren, one of whom was adopted at age twenty; this grandchild did not have a sufficient parent-child relationship with the adoptive parent to qualify under subsection (b)(3). If there is sufficient extrinsic evidence that Decedent did not wish to have the qualifications of subsection (b) apply, then the adopted grandchild may take his or her share of the transfer.

(2) INHERITANCE RIGHTS BETWEEN ADOPTED PERSON AND BIRTH RELATIVES.

(am) Subject to sub. (5), a legally adopted person ceases to be treated as a child of the person's birth parents (and the birth parents cease to be treated as the parents of the child) for the same purposes specified in sub. (1)(a), except:

Committee Note: The core provision of (2)(am) parallels the provision of (1): when the adoptee becomes a member of the adoptive family, the relationship to the birth family is severed. However, note that the general rule is that this severance occurs because of the adoption itself; it is not dependent on whether one of the criteria in (1)(b) is met. Thus, in a strategic adoption the adoptee generally will not be considered to be a member of the adoptive family, but nonetheless will cease to be a member of his or her birth family. This is justified on the premise that strategic adoption is a matter between consenting adults³; by attaching to a new family, the adoptee has chosen to cut his or her ties to the birth family.⁴

There are two exceptions to the general rule:

1. Subject to sub. (5), if the parent-child relationship between the child and one birth parent is replaced by adoption, but the relationship to the other birth parent is not replaced, then for all purposes the child remains the birth child of the parent whose relationship was not replaced.

³ Under Chapter 882, only the consent of the adoptive parent (and spouse, if any) and child is necessary; preexisting parental rights do not need to be terminated. See, eg, § 882.02, 882.04.

⁴ This provision tracks former s. 854.20 (2)(a). A cross reference to the contrary intent subsection, sub (5), has been added, and the general cross reference to former sub (4) has been eliminated because in the Committee's view, severance occurs because of the adoption itself, and should not be dependent on whether one of the criteria in (1)(b) [formerly sub (4)] is met. The clause "and the birth parents cease to be treated as the parents of the child" has been added to clarify that the change in relationship goes in both directions; the adopted child is no longer treated as the child of the birth parents, and vice versa.

Committee Note: Subsection 1. serves a technical purpose: the general rule says that an adopted person ceases to be a member of his or her birth family, but if the relationship to just one parent has been replaced, the other parent is obviously still a birth parent.⁵

2. a. Subject to sub. (5), if a birth parent of a marital child dies and the other birth parent subsequently remarries and the child subsequently is adopted by the stepparent, the child continues to be treated as the child of the deceased birth parent for purposes of transfers at death through that parent and for purposes of any statute or other rule conferring rights upon children or issue of that parent under the law of intestate succession or governing instruments.

b. Subject to sub. (5), sub 2.a. does not apply unless the adopted person was a minor at the time of adoption or the adopted person was raised by the adoptive parent in a parent-like relationship beginning on or before the child's 15th birthday and lasting for a substantial period or until adulthood.

c. Subject to sub. (5), sub 2.a. does not apply if the parental rights of the deceased birth parent had been terminated.

Committee Note: The only substantive exception to the termination of the relationship to the birth family occurs in narrow situation described in subsection (2)(am)2.⁶ The policy here is to not discourage adoption by cutting off the lines to the family of the deceased parent when the surviving

⁵ This provision is based on former s. 854.20(2)(a), which referred to a special case of this situation: "If a birth parent marries or remarries and the child is adopted by the stepparent, for all purposes the child is treated as the child of the birth parent whose spouse adopted the child." The revision recognizes that there may be other situations where only one birth parent is replaced by an adoptive parent.

Under the former statute, this provision may have been limited by 854.20(4), which incongruously would have meant that if only one parent were replaced by adult adoption, the relationship to the other parent could nonetheless be terminated for inheritance purposes; under the revised statute the connection to former 854.20(4) has been eliminated.

⁶ The prior statute provided that it applied for purposes of inheritance through the predeceased birth parent, while the revised statute applies for purposes of transfers at death. The term "inheritance" has no agreed upon definition; the revised language clarifies that the provision applies to all transfers at death.

parent remarries and the step parent wants to adopt the child.⁷ Section (2)(am)2 is limited to marital children and to a parent who remarries; it does not confer the benefit of “double dipping” in domestic partnership situations. However, as explained below the exception could be extended to domestic partnership situations under the contrary intent rule of sub (5).

It is important to note that the general rule of (2)(am) and each of its parts yield to the contrary intent of the transferor. Consider the following examples:

1. A and B are birth parents of a nonmarital child, C. A dies, and B’s partner adopts C. A’s parents provide for a transfer at death to their “grandchildren,” and sufficient extrinsic evidence exists to show that A’s parents meant to include C as a grandchild. Under sub (5), the general provision of (2)(am) would be negated, and C would take.
2. A and B are birth parents of a marital child, C. A dies, and B’s new spouse adopts C. A’s parents provide for a transfer at death to their “grandchildren,” and sufficient extrinsic evidence exists to show that A’s parents did not intend to include C as a grandchild. Under sub (5), the exception of (2)(am)2 would be negated, the general provision of (2)(am) would apply, and C would not take.

The prior statute provided that it applied for purposes of any statute or other rule conferring rights upon children, issue or relatives of the predeceased birth parent. The revised statute removes the reference to relatives in order to clarify that while the adopted child continues to take through the predeceased parent, the relatives of the predeceased birth parent do not take from or through the child. This clarification is amplified in new sub [2][bm]

(bm) Subject to sub. (5), in the situation described in sub.(am)2, the child is not treated as the child of the deceased birth parent for purposes of transfers at death from or through the child or for purposes of any statute or other rule conferring rights upon relatives of that parent under the law of intestate succession or governing instruments.

Committee Note: Clarifies that while the adopted child continues to take through the predeceased parent, the relatives of the predeceased birth parent do not take from or through the child.

⁷ This provision is similar to former s. 854.20(2)(b). The phrase “for purposes of any statute conferring rights...” has been changed to “for purposes of any statute or other rule conferring rights...” The provisions relating to “double dipping” were changed to match the revisions of (1)(b)3, and a limitation was added to cover the situation where a birth parent's rights had been terminated.

(cm) Subject to sub. (5), if an adopted child is subsequently adopted by another person, the former adoptive parent is treated as a birth parent for purposes of this subsection.

Committee Note: This provision deals with sequential adoption – an adopted person who for some reason gets adopted again. In this case, the prior adoptive parent(s) are considered to be birth parent(s) for purposes of the statute.⁸ The language in the revised statute was broadened from that of the former statute, which listed specific reasons why a child may be “readopted.”⁹

(3); (4)

Committee Note: There is no sub (3) or (4) in the revised statute, because of drafting conventions that apply when a statute is rearranged. The content of those subsections has been integrated into sub (1) and (2) as discussed in the Committee Notes above.

(5) Contrary intent. This section or any of its subparts??? does not apply to a transfer under a governing instrument if the person who executed the instrument had a contrary intent. Extrinsic evidence may be used to construe that intent.

*Committee Note: Sub (5) provides that the rules as stated above are merely default rules. The substance of this provision is unchanged from the former statute. ***** NOTE: We have added “or any of its subparts” in order to emphasize that the contrary intent may be applied to negate any specific subsection or subpart of a subsection [paragraph?] – eg it can apply to negate one of the exceptions. QUESTIONS FOR LRB DRAFTER: Does this change make sense, and if so, should it be made throughout chapter 854? Does the word “section” mean the whole section – eg 854.20, or does it already mean any subpart???*

⁸ This provision replaces s. 854.20(3) in the former statute, and adds a cross reference to sub (5). Since it only relates to the relationship described in sub (2) and not sub (1), it was moved to be a subpart of sub (2), instead of standing separately as sub (3). Also, under the former statute, this provision may be limited by 854.20(4), which incongruously would have meant that sequential adoption is only relevant in limited circumstances; under the revised statute the connection to former 854.20(4) has been eliminated.

⁹ The former statute provided: “if an adoptive parent dies or his or her parental rights are terminated in a legal proceeding and the adopted child is subsequently adopted by another person, the former adoptive parent is considered to be a birth parent for purposes of this section.” The committee decided that it was preferable not to list the possible reasons why a child may be “re-adopted,” since that list might not include all possibilities. For example, an adopted child may, as an adult, decide to be adopted by someone else, just as a birth child might.

1 succession by, through, and from the adopted person and for purposes of any statute
2 conferring rights upon children, issue, or relatives in connection with the law of
3 intestate succession or governing instruments.

4 **SECTION 95.** 854.20 (2) of the statutes is renumbered 854.20 (2) (am), and
5 854.20 (2) (am) (intro.) and 2., as renumbered, are amended to read:

6 854.20 (2) (am) (intro.) Subject to sub. ~~(4)~~ (5), a legally adopted person ceases
7 to be treated as a child of the person's birth parents for the ~~same purposes as under~~
8 specified in sub. (1) (a), except:

9 2. If a birth parent of a marital child dies and the other birth parent
10 subsequently remarries and the child is adopted by the stepparent, the child is
11 treated as the child of the deceased birth parent for purposes of inheritance through
12 that parent and for purposes of any statute conferring rights upon children, issue,
13 or relatives of that parent under the law of intestate succession or governing
14 instruments.

15 **SECTION 96.** 854.20 (3) of the statutes is renumbered 854.20 (2) (bm) and
16 amended to read:

17 854.20 (2) (bm) ~~Sequential adoption.~~ Subject to sub. ~~(4)~~ (5), if an adoptive
18 parent dies or his or her parental rights are terminated in a legal proceeding and the
19 adopted child is subsequently adopted by another person, the former adoptive parent
20 is considered to be a birth parent for purposes of this section.

21 **SECTION 97.** 854.20 (4) of the statutes is renumbered 854.20 (1) (b), and 854.20
22 (1) (b) (intro.), as renumbered, is amended to read:

23 854.20 (1) (b) ~~Applicability.~~ (intro.) ~~Subsections (1), (2) and (3) apply~~
24 Paragraph (a) applies only if at least one of the following applies:

25 **SECTION 98.** 854.20 (5) of the statutes is amended to read:

1 854.20 (5) CONTRARY INTENT. This section does not apply if the to a transfer is
2 made under a governing instrument ~~and there is a finding of if the court finds a~~
3 contrary intent of the person who executed the instrument. *had a contrary intent.* ~~Extrinsic~~ The court may
4 use extrinsic *may be used* evidence ~~may be used~~ to construe that intent.

5 **SECTION 99.** 854.21 (1) (a) (intro.) of the statutes is renumbered 854.21 (1) (a)
6 and amended to read:

7 854.21 (1) (a) Except as provided in ~~par. (b) or~~ sub. (7), a gift of property by a
8 governing instrument to a class of persons described as "issue," "lawful issue,"
9 "children," "grandchildren," "descendants," "heirs," "heirs of the body," "next of kin,"
10 "distributees," or the like includes a person adopted by a person whose birth child
11 would be a member of the class, and issue of the adopted person, if the conditions for
12 membership in the class are otherwise satisfied and ~~any of the following applies:~~ at
13 least one of the criteria under s. 854.20 (1) (b) 1., 2., and 3. is satisfied.

14 **SECTION 100.** 854.21 (1) (a) 1., 2. and 3. of the statutes are repealed.

15 **SECTION 101.** 854.21 (1) (b) of the statutes is amended to read:

16 854.21 (1) (b) Except as provided in sub. (7), a gift ~~under par. (a) of property by~~
17 a governing instrument to a class of persons described as "issue," "lawful issue,"
18 "children," "grandchildren," "descendants," "heirs," "heirs of the body," "next of kin,"
19 "distributees," or the like excludes a birth child and his or her issue otherwise within
20 the class if the birth child has been adopted and would cease to be treated as a child
21 of the birth parent under s. 854.20 (2).

22 **SECTION 102.** 856.05 (5) of the statutes is amended to read:

23 856.05 (5) APPLICABILITY OF SECTION. This section applies to wills, ~~codicils,~~
24 ~~documents incorporated by reference under s. 853.32 (1) or (2) and information~~
25 needed for proof of a ~~lost or otherwise missing~~ will under s. 856.17.

1 **SECTION 103.** 856.15 (1) of the statutes is amended to read:

2 856.15 (1) **GENERALLY.** The court may grant probate of an uncontested will on
3 the execution in open court by one of the subscribing witnesses of a sworn statement
4 that the will was executed as required by the statutes and that the testator was of
5 sound mind, of full age, and not acting under any restraint at the time of the
6 execution thereof. If an uncontested will contains an attestation clause showing
7 compliance with the requirements for execution under s. 853.03 or 853.05 or includes
8 an affidavit in substantially the form under s. 853.04 (1) or (2), the court may grant
9 probate without any testimony or other evidence.

10 **SECTION 104.** 856.16 of the statutes is repealed and recreated to read:

11 **856.16 Self-proved will. (1)** Unless there is proof of fraud or forgery in
12 connection with the affidavit, if a will includes an affidavit in substantially the form
13 under s. 853.04 (1) or (2), all of the following apply:

14 (a) The will is conclusively presumed to have been executed in compliance with
15 s. 853.03.

16 (b) Other requirements related to the valid execution of the will are rebuttably
17 presumed.

18 *seems like this should be (c). What do you think?*
19 (2) A signature affixed to a self-proving affidavit under s. 853.04 that is
20 attached to a will is considered a signature affixed to the will, if necessary to prove
21 the due execution of the will.

22 *if (2) is changed, then this would become (2), of course.*
23 (3) Admission of a will under s. 856.13 or 856.15 is not dependent on the
24 existence of a valid affidavit under s. 853.04.

25 **SECTION 105.** 856.17 of the statutes is amended to read:

26 **856.17 Lost Missing will, how proved.** If any will is lost, destroyed by
27 accident or destroyed without the testator's consent, or otherwise missing, the court

↳ unavailable but
revived under s. 853.11(6),

1 has power to take proof of the execution and validity of the will and to establish the
2 same. The petition for the probate of the will shall set forth the provisions thereof
3 of the will.

4 **SECTION 106.** 857.03 (2) (intro.) of the statutes is amended to read: *repealed? number*

5 857.03 (2) (intro.) The Under s. 766.31 (3), the surviving spouse and a
6 distributee who is a successor in interest to all or part of the decedent's one-half
7 interest in marital property may petition the court to approve an exchange of
8 interests in the marital property. If the court approves the exchange, the personal
9 representative shall exchange their respective interests in 2 or more items of marital
10 property and distribute the items in a manner to conform with the exchange. The
11 exchange shall: *Please see note at Section 21.*

****NOTE: See the note under s. 766.31 (3). I don't understand why this cross-reference is being added.

****NOTE: This section does not appear in an initial applicability provision.

12 **SECTION 107.** 861.01 (3) of the statutes is renumbered 766.31 (7m) and
13 amended to read: *Please see note attached*

14 766.31 (7m) ~~PERSONAL INJURY DAMAGES; LOST EARNINGS.~~ To the extent that
15 marital property includes damages for loss of future income arising from a personal
16 injury claim of the a surviving spouse, the surviving spouse is entitled to receive as
17 individual property that portion of the award that represents an income substitute
18 after the death of the other spouse.

19 **SECTION 108.** 861.01 (4) of the statutes is created to read:

20 861.01 (4) ENFORCEMENT OF SURVIVING SPOUSE'S MARITAL PROPERTY RIGHTS IN
21 NONPROBATE ASSETS. Section 766.70 applies to enforcement of a surviving spouse's
22 marital property rights in nonprobate assets.

23 **SECTION 109.** 861.01 (5) of the statutes is created to read:

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Please also recreate 861.01(3) to read:

PERSONAL INJURY DAMAGES; LOST EARNINGS. The rights of a surviving spouse to that part of a personal injury claim that represents future lost earnings of the surviving spouse are determined by §. 766.31(7m).

1 861.01 (5) DIVISION OF MARITAL PROPERTY ON AGGREGATE BASIS. Section 766.31
2 (3) (b) determines how marital property may be divided upon the death of a spouse.

 ****NOTE: This section does not appear in an initial applicability provision.

3 **SECTION 110.** Subchapter II (title) of chapter 861 [precedes 861.018] of the
4 statutes is amended to read:

5 **CHAPTER 861**

6 SUBCHAPTER II

7 ELECTIVE SHARE IN

8 DEFERRED MARITAL PROPERTY

9 ELECTIVE SHARE AMOUNT

10 **SECTION 111.** 861.02 (title) of the statutes is amended to read:

11 **861.02 (title) Deferred marital property elective share amount.**

12 **SECTION 112.** 861.02 (4) of the statutes is amended to read:

13 861.02 (4) SATISFACTION. Satisfaction of the augmented deferred marital
14 property elective share amount is governed by ss. 861.06, 861.07, and 861.11.

15 **SECTION 113.** 861.02 (6) of the statutes is amended to read:

16 861.02 (6) WAIVER. Waiver of the deferred marital property elective share
17 amount is governed by s. 861.10.

18 **SECTION 114.** 861.02 (7) (b) of the statutes is amended to read:

19 861.02 (7) (b) If a decedent who is not domiciled in this state owns real property
20 in this state, the right rights of the surviving spouse ~~to take an elective share~~ in that
21 property ~~is~~ are governed by s. 861.20.

22 **SECTION 115.** 861.02 (8) of the statutes is repealed and recreated to read:

SECTION 115

S 854.14(2)(c) and

1 861.02 (8) EFFECT IF DEATH CAUSED BY SPOUSE. Section 854.14 (3m) (d) applies
2 to election of deferred marital property if the decedent's surviving spouse unlawfully
3 and intentionally killed the decedent.

4 SECTION 116. 861.04 (1) of the statutes is renumbered 861.04.

5 SECTION 117. 861.04 (2) of the statutes is repealed.

6 SECTION 118. 861.05 (1) (c) of the statutes is amended to read:

7 861.05 (1) (c) Transfers of deferred marital property to persons other than the
8 surviving spouse who did not make the transfer, with the written joinder or written
9 consent of ~~the surviving~~ that spouse.

****NOTE: This section does not appear in an initial applicability provision.

10 SECTION 119. 861.05 (1) (e) of the statutes is created to read:

11 861.05 (1) (e) The deferred marital property component of any deferred
12 *or of assets held in an individual retirement account that are traceable to*
employment benefit plan held by the surviving spouse that would have terminated
13 under s. 766.62 (5) had it been marital property ~~and had the surviving spouse been~~
14 ~~the decedent.~~ *(error in previous draft)*

15 SECTION 120. 861.05 (2) (title) of the statutes is amended to read:

16 861.05 (2) (title) VALUATION OF DECEDENT'S PROPERTY AND TRANSFERS.

17 SECTION 121. 861.05 (2m) of the statutes is created to read:

18 861.05 (2m) VALUATION OF SURVIVING SPOUSE'S PROPERTY AND TRANSFERS. The
19 surviving spouse's property included in the augmented deferred marital property
20 estate under s. 861.04 is valued in the same manner as the decedent spouse's
21 property included in the augmented deferred marital property estate is valued under
22 sub. (2), subject to the following:

*The rollover of a deferred
employment benefit plan.*

1 (a) The surviving spouse shall be treated as having died after the decedent on
2 the date of the decedent's death notwithstanding the 120-hour survival requirement
3 under s. 854.03 (1).

4 (b) Life insurance on the surviving spouse's life shall have the value of the
5 deferred marital property component of the interpolated terminal reserve and the
6 unused portion of the term premium of the policy as of the date of the decedent's
7 death. *Please see insert for new 861.05(2p)*

8 SECTION 122. 861.06 (title) of the statutes is amended to read:

9 **861.06 (title) Satisfaction of deferred marital property elective share**
10 **amount.**

11 SECTION 123. 861.06 (2) (title) of the statutes is amended to read:

12 861.06 (2) (title) INITIAL SATISFACTION OF DEFERRED MARITAL PROPERTY ELECTIVE
13 SHARE AMOUNT.

14 SECTION 124. 861.06 (2) (b) (intro.) of the statutes is amended to read:

15 861.06 (2) (b) (intro.) All marital, individual, deferred marital, or deferred
16 individual property, transferred to the surviving spouse, including any beneficial
17 interest in property transferred in trust:

18 SECTION 125. 861.06 (2) (b) 4. a. of the statutes is amended to read:

19 861.06 (2) (b) 4. a. The first \$5,000 of the value of the gifts from the decedent
20 to the surviving spouse each year. Each gift shall be valued as of the date of the gift.

21 SECTION 126. 861.07 (2) (intro.) of the statutes is amended to read:

22 861.07 (2) PERSONS LIABLE. (intro.) The following persons are liable to make
23 a prorated contribution toward satisfaction of the surviving spouse's deferred
24 marital property elective share amount:

25 SECTION 127. 861.10 (1) of the statutes is amended to read:

*— or perhaps
place at
§. 861.04.*

*861.04
(2m)*

for p. 35

New § 861.05(2p)

861.05(2p) DECEDENT'S PROPERTY AND TRANSFERS WHEN SURVIVING SPOUSE TREATED AS THE DECEDENT. When the surviving spouse is treated as the decedent under s. 861.04, the decedent is not treated as the surviving spouse for purposes of s. 861.05(1)(e), 861.05(2m), or any similar provision.

COMMITTEE NOTE:

Sections 861.05(1)(e) and 861.05(2m) contain provisions that affect the inclusion or valuation of deferred marital property owned by the surviving spouse. Under s. 861.04, the augmented deferred marital property estate includes the value of any deferred marital property that would have been included under s. 861.03 "had the surviving spouse been the decedent." New section 861.05(2p) clarifies that treating the surviving spouse as the decedent under s. 861.04 does not mean that the decedent is now treated as the surviving spouse. The special provisions regarding the surviving spouse only apply to property owned by the *actual* surviving spouse.

New provision: s. 861.06(6)

(6) VALUATION. The value of property used to satisfy the deferred marital property elective share under this section includes the value of any property transferred outright to the surviving spouse, the commuted value of any present or future interest in property transferred to the surviving spouse, and the commuted value of property payable to the surviving spouse under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan or any similar arrangement.

COMMITTEE NOTE:

Clarifies that the method used to calculate the value of property transferred to the surviving spouse in satisfaction of the deferred marital property elective share is that same as the method used to value property included in the augmented deferred marital property estate under § 861.05(2)f.



1 861.10 (1) RIGHT TO ELECT MAY BE WAIVED. The right to elect a deferred marital
2 property elective share amount may be waived by the surviving spouse in whole or
3 in part. The waiver may take place before or after marriage. The waiver ~~shall~~ must
4 be contained in a marital property agreement that is enforceable under s. 766.58 or
5 in a signed document filed with a court described in s. 861.08 (1) (a) after the
6 decedent's death.

7 **SECTION 128.** 861.10 (2) of the statutes is amended to read:

8 861.10 (2) WAIVER OF "ALL RIGHTS". Unless the waiver provides otherwise, a
9 waiver of "all rights", or equivalent language, in the property or estate of a present
10 or prospective spouse, or in a complete property settlement entered into because of
11 separation or divorce, is a waiver of all rights in the deferred marital property
12 elective share amount.

13 **SECTION 129.** 861.11 (2) (a) (intro.) of the statutes is amended to read:

14 861.11 (2) (a) (intro.) Upon a beneficiary's request for payment, a payer or other
15 3rd party who has received satisfactory proof of the decedent's death and who has not
16 received written notice that the surviving spouse or his or her representative intends
17 to file a petition for the deferred marital property elective share amount or that a
18 petition for the election has been filed is not liable for any of the following:

19 **SECTION 130.** 861.11 (2) (b) of the statutes is amended to read:

20 861.11 (2) (b) A payer or other 3rd party is liable for payments made or other
21 actions taken after receipt of written notice of the intent to file a petition for the
22 elective share amount or written notice that a petition for the elective share amount
23 has been filed.

24 **SECTION 131.** 861.11 (5) (b) of the statutes is amended to read:

1 861.11 (5) (b) Notwithstanding sub. (2), in addition to the protections afforded
2 a financial institution under ss. 701.19 (11) and 710.05 and chs. 112 and 705 a
3 financial institution is not liable for having transferred an account included in the
4 augmented deferred marital property estate under s. 861.03 to a beneficiary
5 designated in a governing instrument, or for having taken any other action in
6 reliance on the beneficiary's apparent entitlement under the terms of a governing
7 instrument, regardless of whether the financial institution received written notice
8 of an intent to file, or the filing of, a petition for the deferred marital property elective
9 share amount.

10 **SECTION 132.** 861.17 (3) of the statutes is amended to read:

11 861.17 (3) If the spouse is successful in an action to reach fraudulent property
12 arrangements, recovery is limited to the ~~share~~ amount the spouse would receive
13 under ch. 852 and this chapter. Other rules of this chapter apply so far as possible.
14 Recovery A spouse who recovers under this subsection forfeits any power of
15 appointment ~~which~~ that the surviving spouse possesses over the remaining portion
16 of the fraudulently arranged property, except a special power.

17 **SECTION 133.** 861.21 (1) (a) of the statutes is amended to read:

18 861.21 (1) (a) "Governing instrument" has the meaning given in s. 854.01 (2).

19 **SECTION 134.** 861.21 (4) of the statutes is amended to read:

20 861.21 (4) PAYMENT BY SURVIVING SPOUSE. The court shall assign the interest in
21 the home under sub. (2) or (3) to the surviving spouse upon payment of the value of
22 the interest that does not pass to the surviving spouse under intestacy or under the
23 governing instrument. Payment shall be made to the fiduciary holding title to the
24 interest. The surviving spouse may use assets due him or her from the fiduciary to
25 satisfy all or part of the payment in kind. Unless the court extends the time, the

1 surviving spouse shall have one year from the decedent's death to pay the value of
2 the assigned interest.

3 SECTION 135. 861.31 (1c) of the statutes is repealed.

4 SECTION 136. 861.31 (1m) of the statutes is amended to read:

5 861.31 (1m) The court may, without notice or on such notice as the court
6 directs, order payment by the personal representative or special administrator of an
7 allowance as ~~it~~ the court determines necessary or appropriate for the support of the
8 surviving spouse and any dependent minor children of the decedent during the
9 administration of the estate. ~~In making or denying the order~~ To make the decision,

10 ~~the~~ the court shall consider the size of the probate estate, other resources available for
11 support, the existing standard of living, and any other factors it considers relevant.

12 SECTION 137. 861.31 (2) of the statutes is amended to read:

13 861.31 (2) The court may order that an allowance may be made to the spouse
14 for support of the spouse and any dependent minor children of the decedent, or that
15 separate allowances may be made to the spouse and to the dependent minor children
16 of the decedent or their guardian, if any, if the court finds separate allowances
17 advisable. If there is no surviving spouse, the court may order that an allowance may
18 be made to the dependent minor children of the decedent or to their guardian, if any.

19 SECTION 138. 861.31 (4) (intro.) of the statutes is amended to read:

20 861.31 (4) (intro.) The court may ~~direct~~ order that the allowance be charged
21 against income or principal, either as an advance or otherwise, but ~~in no event may~~
22 the court may not order that an allowance for support of dependent minor children
23 of the decedent be charged against the income or principal interest of the surviving
24 spouse. The court may ~~direct~~ order that the allowance for support of the surviving

seems unnecessary

1 spouse, not including any allowance for support of ~~dependent~~ minor children of the
2 decedent, be applied in satisfaction of any of the following:

3 **SECTION 139.** 861.31 (4) (a) of the statutes is amended to read:

4 861.31 **(4)** (a) Any entitlement of the surviving spouse under s. 853.11 ~~(2)~~
5 853.12.

6 **SECTION 140.** 861.33 (title) of the statutes is amended to read:

7 **861.33 (title) Selection of personalty by surviving spouse or children.**

****NOTE: I did not put any treatment of s. 861.33 in an initial applicability
provision.

8 **SECTION 141.** 861.33 (1) (a) (intro.) of the statutes is amended to read:

9 861.33 **(1)** (a) (intro.) Subject to this section, in addition to all allowances and
10 distributions, the surviving spouse, ~~or if there is no surviving spouse the decedent's~~
11 ~~children~~, may file with the court a written selection of the following personal
12 property, which shall ~~thereupon~~ then be transferred to the spouse ~~or children~~ by the
13 personal representative:

14 **SECTION 142.** 861.33 (1) (b) of the statutes is amended to read:

15 861.33 **(1)** (b) The selection in par. (a) may not include items specifically
16 bequeathed except that the surviving spouse ~~or children~~ may in every case select the
17 normal household furniture, furnishings, and appliances necessary to maintain the
18 home. For this purpose antiques, family heirlooms, and collections ~~which~~ that are
19 specifically bequeathed are not classifiable as normal household furniture or
20 furnishings.

21 **SECTION 143.** 861.33 (1) (c) of the statutes is repealed.

22 **SECTION 144.** 861.33 (2) of the statutes is amended to read:

1 861.33 (2) If it appears that claims may not be paid in full, the court may, upon
2 petition of any creditor, limit the transfer of personalty to the spouse ~~or children~~
3 under this section to items not exceeding \$5,000 in aggregate inventory value until
4 ~~such time as~~ the claims are paid in full or the court otherwise orders; ~~or the court~~
5 may require the spouse ~~or children~~ to retransfer property in excess of \$5,000 or, at
6 the option of the spouse ~~or children~~, pay the excess in value over this amount.

7 **SECTION 145.** 861.33 (3) of the statutes is amended to read:

8 861.33 (3) The surviving spouse ~~or children~~ may select items not specifically
9 bequeathed of the type specified under sub. (1) (a) 4. exceeding in value the \$3,000
10 limit or obtain the transfer of items exceeding the limit set by the court under sub.
11 (2), by paying to the personal representative the excess of inventory value over the
12 respective limit.

13 **SECTION 146.** 861.33 (4) of the statutes is amended to read:

14 861.33 (4) ~~Subject to sub. (1) (c), the~~ The personal representative has power,
15 without court order, to execute appropriate documents to effect transfer of title to any
16 personal property ~~selected by the spouse or children~~ selects under this section. A
17 person may not question the validity of the documents of transfer or refuse to
18 accomplish the transfer on the grounds that the personal representative is also the
19 surviving spouse ~~or the only child~~ of the decedent.

20 **SECTION 147.** 861.35 (title) of the statutes is amended to read:

21 **861.35 (title) Special allowance for support of spouse and support and**
22 **education of dependent minor children.**

 ***NOTE: I did not put any treatment of s. 861.35 in an initial applicability
provision.

23 **SECTION 148.** 861.35 (1c) of the statutes is repealed.

1 **SECTION 149.** 861.35 (1m) (intro.) of the statutes is amended to read:

2 861.35 **(1m)** (intro.) If the decedent is survived by a spouse or by minor
3 children, the court may order an allowance for the support and education of each
4 dependent minor child until he or she reaches a specified age, not to exceed 18, and
5 for the support of the spouse. This allowance may be made whether the estate is
6 testate or intestate. If the decedent is not survived by a spouse, the court also may
7 allot directly to ~~any of the dependent~~ the minor children household furniture,
8 furnishings, and appliances. ~~No~~ The court may not order an allowance ~~may be made~~
9 under this section if any of the following apply ~~applies~~:

10 **SECTION 150.** 861.35 (1m) (a) of the statutes is amended to read:

11 861.35 **(1m)** (a) The decedent has amply provided for each minor child and for
12 the spouse by the ~~terms of his or her will and the estate is sufficient to carry out the~~
13 ~~terms after payment of all debts and expenses~~ transfer of probate or nonprobate
14 assets, or support and education have been provided for by any other means.

15 **SECTION 151.** 861.35 (1m) (b) of the statutes is amended to read:

16 861.35 **(1m)** (b) In the case of ~~dependent~~ minor children, if the surviving spouse
17 is legally responsible for support and education and has ample means to provide
18 them in addition to his or her own support.

19 **SECTION 152.** 861.35 (1m) (c) of the statutes is amended to read:

20 861.35 **(1m)** (c) In the case of the surviving spouse, if he or she has ample means
21 to provide for his or her support.

22 **SECTION 153.** 861.35 (2) of the statutes is amended to read:

23 861.35 **(2)** The court may set aside property to provide an allowance and may
24 appoint a trustee to administer the property, subject to the continuing jurisdiction
25 of the court. If a child dies or reaches the age of 18, or if at any time the property held

1 by the trustee is no longer required for the support of the spouse or the support and
2 education of ~~any dependent~~ the minor child, any remaining property is to be
3 distributed by the trustee as ~~directed by the court~~ orders in accordance with the
4 terms of the decedent's will or to the heirs of the decedent in intestacy or to satisfy
5 unpaid claims of the decedent's estate.

6 SECTION 154. 861.35 (3) (a) of the statutes is amended to read:

7 861.35 (3) (a) The effect on claims under s. 859.25. The court shall balance the
8 needs of the spouse or ~~dependent~~ minor children against the nature of the creditors'
9 claims in setting the amount allowed under this section.

10 SECTION 155. 861.35 (4) (intro.) of the statutes is amended to read:

11 861.35 (4) (intro.) The court may ~~direct~~ order that the allowance to the
12 surviving spouse, not including any allowance for the support and education of
13 ~~dependent~~ minor children, be applied in satisfaction of any of the following:

14 SECTION 156. 861.35 (4) (a) of the statutes is amended to read:

15 861.35 (4) (a) Any entitlement of the surviving spouse under s. 853.11 (2)
16 853.12.

17 SECTION 157. 863.15 of the statutes is amended to read:

18 **863.15 Right of retention Debts to estate.** ~~When~~ If a distributee of an estate
19 is indebted to the estate, the ~~amount of the indebtedness if due, or the present worth~~
20 ~~of the indebtedness, if not due, shall be treated as an offset by the personal~~
21 ~~representative against property of the estate to which the distributee is entitled. In~~
22 ~~contesting the offset the distributee shall have the benefit of any defense which~~
23 ~~would be available to the distributee in a direct proceeding by the personal~~
24 ~~representative for the recovery~~ treatment of the debt is governed by s. 854.12.

25 SECTION 158. 863.16 of the statutes is repealed.

(Please see separate sheet.)

LRB 0349/P1

Sections 158, 159

Please recreate §§ 863.16 and 863.19 as follows:

863.16 Value used in distribution of fractional shares. Valuation of property distributed in satisfaction of a fractional share is determined by s. 854.115.

863.19 Valuation used in distribution of estate assets. Valuation of property distributed in satisfaction of a pecuniary bequest, or a dollar amount fixed by formula or otherwise is determined by s. 854.115.

no 16

****NOTE: This section does not appear in an initial applicability provision.

1 **SECTION 159.** 863.19 of the statutes is repealed.

*Please see
separate sheet*

****NOTE: This section does not appear in an initial applicability provision.

2 **SECTION 160.** 865.07 (1) (d) of the statutes is amended to read:

3 865.07 (1) (d) The decedent died intestate or testate, and, if testate, whether
4 the original will is in the possession of the court or accompanies the application and,
5 contains an attestation clause showing compliance with the requirements of
6 execution under s. 853.03 or 853.05 or includes an affidavit in substantially the form
7 under s. 853.04 (1) or (2), and does not expressly prohibit informal administration;

8 **SECTION 161.** 1997 Wisconsin Act 188, section 233 (1) is amended to read:

9 [1997 Wisconsin Act 188] Section 233 (1) This act first applies to deaths
10 occurring on revocable instruments where the death occurred on or after January 1,
11 1999, ~~except with respect to irrevocable governing instruments executed before that~~
12 date and to irrevocable instruments that were executed on or after January 1, 1999,
13 or that became irrevocable on or after January 1, 1999.

*Please see
separate sheet.*

****NOTE: Did you want this treatment to appear in an initial applicability provision?

14 **SECTION 162. Initial applicability.**

Please see separate sheet.

15 (1) The treatment of section 40.02 (8) (a) 2. of the statutes first applies to deaths
16 occurring on the first day of the 10th month beginning after the effective date of this
17 subsection.

18 (2) The treatment of sections 40.18, 700.11 (1), 701.115 (2) and (3), 705.27,
19 766.61 (7), 766.62 (5) (intro.), 852.12, 853.32 (2) (a), 854.03 (5) (h) and (i) and (7),
20 854.05 (5), 854.07 (3), 854.08 (6) (a) 1., 854.12, 854.14 (1), (3m), and (5) (a), (b), and
21 (c), 861.31 (1c), (1m), (2), and (4) (intro.), and 863.15 of the statutes, the renumbering
22 of section 701.115 (1) of the statutes, the renumbering and amendment of sections

Proposed change to 867.03

\$50,000

867.03 Transfer by affidavit.

(1g) GENERALLY. When a decedent leaves ~~solely owned~~ property subject to administration in this state which does not exceed \$20,000 in value, any heir of the decedent or person who was guardian of the decedent at the time of the decedent's death may collect any money due the decedent, receive the property of the decedent and have any evidence of interest, obligation to or right of the decedent transferred to the affiant if the heir or guardian provides to the person owing the money, having custody of the property or acting as registrar or transfer agent of the evidences of interest, obligation to or right, or, if the property is an interest in or lien on real property, provides to the register of deeds preliminary to the recording required under sub. (2m), proof of prior mailed notice under sub. (1m) if applicable and an affidavit in duplicate showing all of the following

- (a) A description of and the value of the property to be transferred.
- (b) The total value of the decedent's property subject to administration in this state at the date of decedent's death.
- (c) Whether the decedent or the decedent's spouse ever received the family care benefit under s. 46.286, medical assistance under subch. IV of ch. 49, long-term community support services funded under s. 46.27 (7) or aid under s. 49.68, 49.683 or 49.685.

.....

COMMITTEE NOTE:

mentioned in the statute refers

Clarifies that the \$20,000 total value ~~only applies~~ to probate property, and that the decedent's interest in that property may not be "solely owned" in the strict sense; rather it may be an interest in marital or community property.

Amount changed from \$20,000 to \$50,000 to reflect inflation since the original value was set.

ADDITIONAL REQUEST:

Please make parallel changes elsewhere in 867.03 as necessary, and also in other sections of chapter 867, dropping the phrase "solely owned" and modifying "property" to refer to "property subject to administration."

SECTION 161. 1997 Wisconsin Act 188, section 233 (1) is amended to read:

[1997 Wisconsin Act 188] Section 233 Initial applicability.

1) This act first applies to transfers relating to deaths occurring on January 1, 1999, except that the act does not apply to transfers under ~~with respect to~~ irrevocable governing instruments executed before that date.

SECTION 162. Initial applicability.

The following sections first apply to transfers related to deaths occurring on the effective date of this act, except that these sections do not apply to transfers under governing instruments that became irrevocable prior to that date.

[section numbers in draft 0349/P1 and titles of sections are included for reference]

Section 1. 40.02(8)(a)2 Definitions; Beneficiary.

Section 14-18. 705.04(2) Right of survivorship.

Section 18AA. 705.06. Protection of financial institutions.

Section 19. 705.27. Security registration: ownership on the death of the owner.

Section 32-33. 852.01(1)(a)2. Spousal share under intestate succession.

Section 35. 852.12. Debts to a decedent.

Section 71-75. 854.08(5)& (6). Nonademption of specific gifts in certain cases.

Section 76. 854.115. Valuation of distributed assets.

Section 77. 854.12. Offsetting a debt to the transferor.

Section 135-39. 861.31. Allowance to family during administration.

Section 140-46. 861.33. Selection of personalty by surviving spouse.

Section 147-56. 861.35. Special allowance for support of spouse
and support and education of minor children.

Section 157. 863.15. Right of retention.

Section 158. 863.16. Value used in distribution of fractional shares.

Section 159. 863.19. Valuation used in distribution of estate assets.

*some parts of
also 854.20*

In addition to this statement of applicability, we request that the Act:

- Remain silent on the initial applicability date for statutory changes identified as remedial or procedural; ie those not listed above.
- In a Statement of Legislative Intent and/or an Explanatory Note published as part of the bill, affirmatively state that the changes that do not have a stated initial applicability date (ie, that are not included in the list above) are remedial or procedural, and are assumed to apply to any matter that has not been resolved as of the effective date of the Act, irrespective of whether the death occurred before or after the effective date of that Act.

1 705.04 (2) and 854.08 (5) of the statutes, and the creation of sections 701.115 (1) (a),
2 705.04 (2) (a), (d), (e), and (f), and 854.08 (5) (a) and (d) of the statutes first apply
3 retroactively to deaths occurring on January 1, 1999, except with respect to
4 irrevocable governing instruments executed before that date.

5 (3) The treatment of sections 701.20 (5) (d), 702.03 (1), 767.266 (1) (b), 851.31,
6 851.50, 852.01 (1) (b), 853.03 (2) (intro.), (a), (b), and (c), 853.04 (3), 853.11 (2), (2m),
7 (3), and (6) (c) and (d), 854.03 (2) (b), (3), (4), (5) (g), and (6), 854.04 (1) (a) and (5)
8 (intro.), 854.06 (1) (b) and (4) (a), (am), and (b), 854.08 (6) (a) 2., 854.13 (2) (gm), (7)
9 (a), (8), (9), and (10), 854.15 (1) (e), 854.18 (1) (a) (intro.) and (3), 854.20 (1), (2), (3),
10 (4), and (5), 854.21 (1) (a) (intro.), 1., 2., and 3. and (b), 856.05 (5), 856.15 (1), 856.16,
11 856.17, 861.01 (3) and (4), 861.02 (4), (6), (7) (b), and (8), 861.04 (1) and (2), 861.05
12 (1) (e) and (2m), 861.06 (2) (b) (intro.) and 4. a., 861.07 (2) (intro.), 861.10 (1) and (2),
13 861.11 (2) (a) (intro.) and (b) and (5) (b), 861.17 (3), 861.21 (1) (a) and (4), and 865.07
14 (1) (d), of the statutes, the renumbering of sections 766.62 (4), 853.32 (1), and 854.17
15 of the statutes, the renumbering and amendment of sections 701.24, 852.01 (1) (a)
16 2., 853.32 (2) (b), and 854.01 of the statutes, and the creation of sections 701.24 (2),
17 766.62 (4) (b) and (c), 852.01 (1) (a) 2. b., 853.32 (1) (bm) and (2) (b) 4., 854.01 (1), and
18 854.17 (2) of the statutes first apply to deaths occurring on the effective date of this
19 subsection, except with respect to irrevocable governing instruments executed
20 before that date.

21 (END)



State of Wisconsin
2003 - 2004 LEGISLATURE

P2
LRB-0349/P2

CMH:jld:pg
kmr

Tues. July 13
NOON

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

D-N

refer cat

1 AN ACT *to repeal* 854.03 (3), 854.03 (4), 854.03 (7), 854.06 (1) (b), 854.14 (1),
2 854.21 (1) (a) 1., 2. and 3., 861.04 (2), 861.31 (1c), 861.33 (1) (c), 861.35 (1c),
3 863.16 and 863.19; *to renumber* 701.115 (1), 766.62 (4), 853.32 (1), 854.17 and
4 861.04 (1); *to renumber and amend* 701.24, 705.04 (2), 766.31 (3), 852.01 (1)
5 (a) 2., 853.11 (2), 853.32 (2) (b), 854.01, 854.06 (4) (a), 854.08 (5), 854.15 (1) (e),
6 854.20 (1), 854.20 (2), 854.20 (3), 854.20 (4), 854.21 (1) (a) (intro.) and 861.01
7 (3); *to amend* 40.02 (8) (a) 2., 700.11 (1), 701.115 (2), 701.115 (3), 701.20 (5) (d),
8 701.24 (title), 702.03 (1), 705.27, 766.61 (7), 766.62 (5) (intro.), 767.266 (1) (b),
9 851.21 (1) (b), 851.31, 851.50, 852.01 (1) (b), 852.12, 853.03 (2) (intro.), 853.03
10 (2) (a), 853.03 (2) (b), 853.03 (2) (c), 853.11 (3), 853.11 (6) (c), 853.11 (6) (d),
11 853.32 (2) (a), 854.03 (2) (b), 854.03 (5) (d), 854.03 (6), 854.04 (1) (a), 854.04 (5)
12 (intro.), 854.05 (5), 854.06 (4) (b), 854.07 (3), 854.08 (6) (a) 1., 854.08 (6) (a) 2.,
13 854.13 (7) (a), 854.13 (8), 854.13 (9), 854.13 (10), 854.14 (5) (a), 854.14 (5) (b),
14 854.14 (5) (c), 854.18 (1) (a) (intro.), 854.18 (3), 854.20 (5), 854.21 (1) (b), 856.05
15 (5), 856.15 (1), 856.17, 857.03 (2) (intro.), subchapter II (title) of chapter 861

[precedes 861.018], 861.02 (title), 861.02 (4), 861.02 (6), 861.02 (7) (b), 861.05 (1) (c), 861.05 (2) (title), 861.06 (title), 861.06 (2) (title), 861.06 (2) (b) (intro.), 861.06 (2) (b) 4. a., 861.07 (2) (intro.), 861.10 (1), 861.10 (2), 861.11 (2) (a) (intro.), 861.11 (2) (b), 861.11 (5) (b), 861.17 (3), 861.21 (1) (a), 861.21 (4), 861.31 (1m), 861.31 (2), 861.31 (4) (intro.), 861.31 (4) (a), 861.33 (title), 861.33 (1) (a) (intro.), 861.33 (1) (b), 861.33 (2), 861.33 (3), 861.33 (4), 861.35 (title), 861.35 (1m) (intro.), 861.35 (1m) (a), 861.35 (1m) (b), 861.35 (1m) (c), 861.35 (2), 861.35 (3) (a), 861.35 (4) (intro.), 861.35 (4) (a), 863.15 and 865.07 (1) (d); **to repeal and recreate** 701.19 (10), 853.04 (3), 854.17 (title), 856.16 and 861.02 (8); **to create** 40.18, 701.115 (1) (a), 701.24 (2), 705.04 (2) (a), 705.04 (2) (d), 705.04 (2) (e), 705.04 (2) (f), 766.31 (3) (a) and (b), 766.62 (4) (b), 766.62 (4) (c), 851.055 (1m), 852.01 (1) (a) 2. b., 853.11 (2m), 853.32 (1) (bm), 853.32 (2) (b) 4., 854.01 (1), 854.03 (5) (g), 854.03 (5) (h), 854.03 (5) (i), 854.03 (5) (j), 854.06 (4) (am), 854.08 (5) (a), 854.08 (5) (d), 854.115, 854.12, 854.13 (2) (gm), 854.14 (3m), 854.17 (2), 861.01 (4), 861.01 (5), 861.05 (1) (e) and 861.05 (2m) of the statutes; and **to affect** 1997 Wisconsin Act 188, section 233 (1); **relating to:** miscellaneous modifications to the Wisconsin Probate Code.

Analysis by the Legislative Reference Bureau

This bill primarily corrects technical errors and clarifies various provisions in 1997 Wisconsin Act 188, which modernized the Wisconsin Probate Code. This bill also continues the process of extending various interpretative rules from probate to nonprobate assets and of allowing extrinsic evidence to be used when interpreting the intent of the transferor. This bill also creates additional protections for a decedent spouse who is murdered by the surviving spouse.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 40.02 (8) (a) 2. of the statutes is amended to read:

2 40.02 (8) (a) 2. In the absence of a written designation of beneficiary, or if all
3 beneficiaries so designated die before filing with the department an application for
4 any death benefit payable, the person determined in the following sequence: group
5 1, widow or widower; group 2, children if at least one child survives the participant,
6 employee or annuitant, in which event the share of any deceased child shall be
7 payable to the surviving spouse of the child or to the surviving children of the child
8 if there is no spouse, or otherwise to the other eligible children in this group; group
9 3, grandchild; group 4, parent; group 5, brother and sister issue, as defined in s.
10 851.13, ~~in equal shares to the children of the designated person~~ ^{per stirpes} as described in s.
11 854.04 (1). No payment may be made to a person included in any group 2 if there is
12 a living person in any preceding group 1.

****NOTE: I changed "per stirpes" to increase the readability of the statute. Do you
want to start removing any other jargon from the statutes?

13 SECTION 2. 40.18 of the statutes is created to read:

14 40.18 Applicability of other statutes. (1) MARITAL PROPERTY RIGHTS.

15 Chapter 766 applies to ownership rights and remedies of a spouse in benefits
16 provided under this chapter.

17 (2) TRANSFERS AT DEATH. Chapter 854 applies to transfers at death under this
18 chapter.

19 (3) DEFERRED MARITAL PROPERTY ELECTION. Sections 861.018 to 861.10 apply to
20 the election rights of a surviving spouse in benefits provided under this chapter.

21 SECTION 3. 700.11 (1) of the statutes is amended to read:

22 700.11 (1) If a statute or governing instrument, as defined in s. 854.01 (2),
23 specifies that property is to be distributed to, or a future interest is to be created in,

score → inter vivos governing instrument, as defined in s. 700.27 (1) (b),

1 a designated individual's "heirs", "heirs at law", "next of kin", "relatives," or
2 "family," or a term that has a similar meaning, or if a class gift in favor of
3 "descendants", "issue," or "heirs of the body" does not specify the manner in which
4 the property is to be distributed among the class members, the property is
5 distributed according to s. 854.22.

INS
4-4
6 SECTION 4. 701.115 (1) of the statutes is renumbered 701.115 (1) (b).

7 SECTION 5. 701.115 (1) (a) of the statutes is created to read:

8 701.115 (1) (a) In par. (b), "revocable trust" means a trust that the grantor, at
9 the time of death, was alone empowered to change or revoke, by law or under the
10 instrument creating the trust, regardless of whether the grantor then had the
11 capacity to exercise the power.

12 SECTION 6. 701.115 (2) of the statutes is amended to read:

13 701.115 (2) Survivorship under sub. (1) (b) is governed by s. 854.03.

14 SECTION 7. 701.115 (3) of the statutes is amended to read:

15 701.115 (3) The rights of the issue of a predeceasing beneficiary under sub. (1)
16 (b) are governed by s. 854.06.

17 SECTION 8. 701.19 (10) of the statutes is repealed and recreated to read:

18 701.19 (10) RESTRICTION ON EXERCISE OF POWERS. (a) Except as provided in par.
19 (c), a person may not exercise any of the following powers conferred upon him or her
20 in his or her capacity as trustee:

21 1. The power to make discretionary distributions of trust principal or income
22 if the distributions are to himself or herself or for the discharge of his or her legal
23 obligations.

24 2. The power to make discretionary allocations of receipts or expenses as
25 between principal and income if the allocations are in his or her favor.

1 (b) If a power under par. (a) is conferred upon more than one person as trustee,
2 a person who is not disqualified to act under par. (a) may exercise the power for the
3 benefit of the person who is disqualified to act, unless the creating instrument
4 expressly provides otherwise. A special trustee appointed by a court may exercise
5 a power under par. (a) for the benefit of the disqualified person if no other trustee is
6 qualified to exercise the power.

7 (c) Paragraph (a) does not apply if any of the following applies:

8 1. The person is also the settlor of the trust, and the trust may be revoked or
9 amended by the settlor.

10 2. The terms of the creating instrument specifically limit the scope of the power
11 to expenditures and distributions of income or principal on the basis of an
12 ascertainable standard relating to the person's health, maintenance, support, or
13 education such that the person would not be subject to tax under section 2041 or 2514
14 of the Internal Revenue Code as a result of having or exercising the power.

15 3. The person is the spouse, widow, or widower of the settlor of the trust, and
16 a marital deduction has been allowed for federal gift or estate tax purposes with
17 respect to the trust property that is subject to the power.

18 4. ^{negates the application of} The creating instrument ~~specifically confers the powers that~~ par. (a)
19 ~~prohibits.~~ ^{with respect to the power}

***NOTE: I changed this subdivision because I don't think the instrument has to
say "s. 701.19 (10) (a) does not apply." The instrument could simply confer the powers,
couldn't it?

20 SECTION 9. 701.20 (5) (d) of the statutes is amended to read:

21 701.20 (5) (d) A legatee, including a trustee, of a specific amount of money not
22 determined by a pecuniary formula shall not be paid any part of the income of the
23 estate but shall receive interest on any unpaid portion of the legacy for the period

1 commencing one year after decedent's death at the legal rate set forth in s. 138.04.
2 For purposes of this paragraph, the deferred marital property elective share amount
3 elected by a surviving spouse under s. 861.02 (1) is a bequest of a specific amount of
4 money not determined by a pecuniary formula.

5 **SECTION 10.** 701.24 (title) of the statutes is amended to read:

6 **701.24 (title) Applicability of ss. 701.01 to 701.23.**

7 **SECTION 11.** 701.24 of the statutes is renumbered 701.24 (1) and amended to
8 read:

9 701.24 (1) Except as otherwise provided in sub. (2) and s. 701.19 (9) (a) ~~and (10)~~,
10 ss. 701.01 to 701.23 are applicable to a trust existing on July 1, 1971, as well as a trust
11 created after such date, and shall govern trustees acting under such trusts. If
12 application of any provision of ss. 701.01 to 701.23 to a trust in existence on August
13 1, 1971, is unconstitutional, it shall not affect application of the provision to a trust
14 created after that date.

15 **SECTION 12.** 701.24 (2) of the statutes is created to read:

16 701.24 (2) Section 701.19 (10) is applicable to a trust existing on the effective
17 date of this subsection [revisor inserts date], as well as a trust created after that
18 date, and shall govern trustees acting under such trusts. If application of any
19 provision of s. 701.19 (10) to a trust in existence on the effective date of this
20 subsection [revisor inserts date], is unconstitutional, it shall not affect application
21 of the provision to a trust created after that date.

22 **SECTION 13.** 702.03 (1) of the statutes is amended to read:

23 702.03 (1) Unless ^{the person who executed it had} a contrary intention ~~is found~~, if a governing instrument, as
24 defined in s. 854.01 (2), creating a power of appointment expressly requires that the
25 power be exercised by any type of reference to the power or its source, ~~it is presumed~~

or an inter vivos governing instrument, as defined in s. 700.27 (1)(b)

1 that the donor's intention in requiring the reference was is presumed to be to prevent
2 an inadvertent exercise of the power. Extrinsic The court may use extrinsic evidence
3 may be used to show contrary intent. ✓

4 **SECTION 14.** 705.04 (2) of the statutes is renumbered 705.04 (2) (intro.) and
5 amended to read:

6 705.04 (2) (intro.) If the account is a P.O.D. account, on the death of the original
7 payee or the survivor of 2 or more original payees, ~~any sums remaining on deposit~~
8 ~~belong to the P.O.D. beneficiaries if surviving, or to the survivor of them if one or more~~
9 ~~die before the original payee. Payment may be made to a minor P.O.D. beneficiary,~~
10 ~~however, only in accordance with a procedure approved in ch. 880. all of the following~~
11 apply:

12 (b) If there are 2 or more P.O.D. beneficiaries and they all survive, they shall
13 be are entitled to payment of the sums on deposit in accordance with such any written
14 instructions ~~as may have been that the owner~~ filed with the financial institution, ~~and~~
15 ~~or, if none the owner left no written instructions,~~ to payment in equal shares. There

16 (c) If 2 or more persons succeed to ownership of the account, there is no further
17 ~~right of survivorship in the event of the death of one of 2 or more P.O.D. beneficiaries~~
18 ~~after their entitlement to payment has matured unless the terms of the account~~
19 ~~expressly provide for survivorship or for the account's continuance as a joint account.~~

20 **SECTION 15.** 705.04 (2) (a) of the statutes is created to read:

21 705.04 (2) (a) If there is one P.O.D. beneficiary and he or she survives, he or she
22 is entitled to payment of all sums remaining on deposit.

23 **SECTION 16.** 705.04 (2) (d) of the statutes is created to read:

24 705.04 (2) (d) If any P.O.D. beneficiary predeceases the original payee or the
25 survivor of 2 or more original payees, any written instructions that the owner filed

✓
Subject to s. 705.06 (1)(c), ✓

1 with the financial institution determine the rights of the P.O.D. beneficiaries. If the
2 owner left no applicable written instructions, the amount to which the predeceased
3 P.O.D. beneficiary would have been entitled passes to any of his or her issue who
4 would take under s. 854.06 (3).

5 **SECTION 17.** 705.04 (2) (e) of the statutes is created to read:

6 705.04 (2) (e) If no P.O.D. beneficiary or predeceased P.O.D. beneficiary's issue
7 who would take under s. 854.06 (3) survives the death of all owners, the account
8 belongs to the estate of the deceased sole owner or the estate of the last to die of
9 multiple owners.

10 **SECTION 18.** 705.04 (2) (f) of the statutes is created to read:

11 705.04 (2) (f) Payment may be made to a minor P.O.D. beneficiary only in
12 accordance with a procedure approved under ch. 880.

✓
INS
8-12
13 **SECTION 19.** 705.27 of the statutes is amended to read:

14 **705.27 Ownership on death of owner.** On death of a sole owner or the last
15 to die of multiple owners, ownership of securities registered in beneficiary form
16 passes to the beneficiary or beneficiaries who survive all owners and to any
17 predeceased beneficiary's issue who would take under s. 854.06 (3). On proof of death
18 of all owners and compliance with any applicable requirements of the registering
19 entity, a security registered in beneficiary form may be reregistered in the name of
20 the ~~beneficiary or beneficiaries who survive the death of all owners~~ successors to the
21 ownership interest. Until division of the security after the death of all owners,
22 ~~multiple beneficiaries surviving the death of all owners~~ successors to the ownership
23 interest hold their interests as tenants in common. If no beneficiary or predeceased
24 beneficiary's issue who would take under s. 854.06 (3) survives the death of all

1 owners, the security belongs to the estate of the deceased sole owner or the estate of
2 the last to die of multiple owners.

INS
9.3
3 ~~SECTION 20. 766.31 (3) of the statutes is renumbered 766.31 (3) (b) (intro.) and~~
4 amended to read:

5 766.31 (3) (b) (intro.) Each spouse has a present undivided one-half interest
6 in each item of marital property, but the marital property interest of the
7 nonemployee spouse in a deferred employment benefit plan or in assets in an
8 individual retirement account that are traceable to the rollover of a deferred
9 employment benefit plan terminates at the death of the nonemployee spouse if he or
10 she predeceases the employee spouse. subject to all of the following:

***NOTE: This section does not appear in an initial applicability provision.

11 SECTION 21. 766.31 (3) (a) and (b) of the statutes are created to read:

12 766.31 (3) (a) Section 766.62 (5)
1. and 2.

13 (b) 1. Spouses may provide in a marital property agreement that at the death
14 of a spouse some or all of their marital property will be divided based on aggregate
15 value rather than divided item by item. At the death of a spouse,

16 2. The surviving spouse and the successor in interest to the decedent's share
17 of marital property may enter into an agreement providing that some or all of the
18 marital property in which each has an interest will be divided based on aggregate
19 value rather than divided item by item.

20 3. The court does not need a marital property agreement to recognize a division
21 of marital property that is not item by item. is not necessary

22 4. This paragraph does not have to comply with the procedures under s. 857.03
23 (2)

***NOTE: Given subd. 4., I do not understand the proposed cross-reference to s.
766.31 (3) in s. 857.03 (2). This paragraph does not have to comply with s. 857.03 (2), but

- 10 - CS

PROPERTY ACQUIRED.

s. 857.03 (2), which begins "under s. 766.31 (3)," allows an exchange only if the parties comply with the procedures under s. 857.03 (2) (a) to (d). Should that cross-reference be deleted?

INS ✓
10-1 1 SECTION 22. 766.61 (7) of the statutes is amended to read:

2 766.61 (7) ~~If~~ Except as provided in s. 854.14 (3m) (b) 2., if a noninsured spouse
3 predeceases an insured spouse, the marital property interest of the decedent spouse
4 in a policy which that designates the surviving spouse as the owner and insured is
5 limited to a dollar amount equal to one-half of the marital property interest in the
6 interpolated terminal reserve and in the unused portion of the term premium of the
7 policy on the date of death of the deceased spouse. All other rights of the decedent
8 spouse in the ownership interest or proceeds of the policy, other than the marital
9 property interest described in this subsection, terminate at the decedent spouse's
10 death.

INS ✓
10-11 11 SECTION 23. 766.62 (4) of the statutes is renumbered 766.62 (4) (a).

12 SECTION 24. 766.62 (4) (b) of the statutes is created to read:

13 766.62 (4) (b) If a deferred employment benefit plan administrator has reason
14 to believe that a dispute exists as to the rights of parties, or their successors, to a
15 deferred employment benefit, the deferred employment benefit plan administrator
16 may do any of the following:

- 17 1. Deposit the payments with a court.
- 18 2. Refuse to make payments to any person.

19 SECTION 25. 766.62 (4) (c) of the statutes is created to read:

20 766.62 (4) (c) The protection afforded a deferred employment benefit plan
21 administrator under this subsection does not affect the rights of parties or their
22 successors in disputes concerning the beneficial ownership of deferred employment
23 benefits.

pending instruction
from a court ✓

*** Done:
Your instructions indicated I should look for similar language in s. 700, 701, 705, 766, or 857. I will do that task as you request as this is a version of the draft.